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Are international transitional justice mechanisms successful in their attempt to establish stable peace in post-civil war societies?

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I: Introduction

In an article by the Global Policy Forum in 2006 about the prospects of an era of global justice, Samantha Power was asked about the experiences she made during her trip to Darfur in 2005: "She asked many people where they would go if they could escape the violence that oppressed them daily. The common answer was "The Hague". Power said they had heard it was home to a court and they 'wanted to go testify'. 'I wouldn't say they knew about the International Criminal Court (ICC). What they knew was that there was this thing called 'The Hague', a place where bad people were sent, and where over the course of recent years people [who had suffered like them] had had the ability to go and testify," reported Professor Power." (Global Policy Forum 2006) These impressions raise the question of how international justice institutions are perceived. Does the local population actually know about the existence of tribunals such as the International Criminal Court? Do these institutions have an impact on the situation, the peace in the country, despite the distance of its location?

When the International Criminal Court came into existence after long and exhausting negotiations, Kofi Annan, former Secretary-General of the United Nations (UN), stated clearly that in his view the establishment of an international court punishing those responsible for gross crimes against humanity, no matter if they were leaders of militias or presidents of states, was a milestone in the fight for the realization of a strong, global commitment to human rights. Looking at the historical record, governments and political leaders who abused human rights of their population on a large scale were often able to do so with impunity. Since the 1980s however, there has been a shift towards the use of multiple transitional justice mechanisms, including trials, truth commissions, reparations, lustration, museums and other memorials to address past human rights violations (Sikkink/Walling 2007: 427). The trend since the 1980s has been described by Lutz and Sikkink (2001) as "the justice cascade" stating that there is an increasing demand for criminal prosecution in the aftermath of conflict or after the fall of authoritarian regimes. Accountability becomes an issue of growing importance.

This development described as the justice cascade constitutes a turning point, as the question is no longer if there should be transitional justice in the aftermath of conflict, but rather, how should these institutions be constructed? This is why the following research will focus on the question of whether internationally established courts and tribunals are successful in their attempt to achieve peace in post-conflict states. International transitional justice mechanisms are part of liberal peacebuilding processes, which follow the assumption that democratic states are less likely to go to war with each other and consequential states should be constructed after this liberal model. However, critiques of this approach are of the opinion that liberal peacebuilding disregards of cultural diversity and domestic approaches of peacebuilding and rather imposes a system on post-conflict states than actually helping them to reach peace. According to these critiques, hybrid courts can constitute a better alternative to exclusively international tribunals

which lack closeness to the local population. Despite, the now almost as incontrovertible perceived approach of trying responsible individuals for severe human rights crimes, there has been relatively little empirical research about the actual effects of transitional justice mechanisms. That raises the question of whether societies are truly better off with tribunals or if these institutions might even have negative effects. This is why, it will also be investigated how states develop without any form of transitional justice.

After conducting a controlled comparison of the ICC in the DRC, the Special Court for Sierra Leone and no transitional justice in Burundi, it can be concluded that the most successful institutions to establish peace in a post-conflict setting is the approach of the hybrid tribunal.

II: Theoretical Framework

1. Transitional Justice – A Critically Scrutinized Concept

Transitional justice as part of a broader peacebuilding project has been widely discussed in the past decades. Former Secretary-General Kofi Annan stated clearly in his report on “the rule of law and transitional justice in conflict and post-conflict societies” in 2004 that societies can only fully recover from past crimes when they have been addressed through legitimate institutions: “Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.” (UNSC, S/2004/616: 3) This statement summarizes the remarkable proliferation of transitional justice in the last decades well, as the commonly held perception is clearly the advocacy of justice mechanisms punishing past perpetrators for human rights violations (Thoms, Ron and Paris 2008: 9). International human rights organizations, such as Human Rights Watch, Amnesty International and Transparency International have made numerous public statements and have written various articles and research papers on the need to bring justice to victims of human rights violations during conflict and, in addition, prevent mass atrocities such as genocide, war crimes and crimes against humanity in the future through the establishment of transitional justice mechanisms (Snyder and Vinjamuri 2004: 5). The trend towards holding perpetrators accountable for gross human rights violations has been labeled by Lutz and Sikkink (2001) as the “Justice Cascade”, originally meant to describe the developments in Latin America and the increased use of transitional justice mechanisms in this particular geographical area. However, it can be argued now that there has been a “global trend in accountability” (Thoms, Ron and Paris 2008: 15), which can

be observed in the increasing scope of investigations by the International Criminal Court (ICC) in Africa, but also in their expansion towards the Middle East, through the new membership of Palestine for example. Even though international NGOs and various human rights scholars welcome this trend, transitional justice mechanisms were subject to widespread controversial debates whether they truly achieve what they aim to achieve.

1.1 Definition

To give an overview over the most striking and relevant debates within the literature it first has to be defined what exactly is meant by the term transitional justice in the following. The commonly used definition according to the report of the Secretary-General in 2004 is that transitional justice “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” (UNSC, S/2004/616: 4) As mentioned in the definition, transitional justice constitutes a tool to deal with past human rights violations that occurred during conflict. Transitional Justice Mechanisms are efforts to establish “a system of fairness [...] in order to move society away from the violence and instability of the past towards a more stable and less violent future. The underlying assumption of transitional justice is that violence and instability result from past injustices and that those injustices must be addressed before progress can be made towards a more peaceful and stable society.” (Carey et al. 2010: 203) So, basically the notion on which the principle of transitional justice is built upon is “no peace without justice”. It means that advocates of transitional justice are of the opinion that a society cannot move towards a stable and peaceful future without first handling what has happened in the past. Consequential, there were three different objectives identified by Carey et al. (2010: 203-205) that follow this assumption: (1) The first one seems rather obvious but nevertheless has to be mentioned: Achieving justice. There are different assumptions on how to achieve this goal which will be discussed in the section about retributive and restorative justice. (2) Finding the truth about what exactly happened and (3) Coming to terms with the past and achieving reconciliation of all parties involved.

1.2 Retributive vs. Restorative Justice

The means of how to achieve these three objectives of transitional justice depend on different assumptions about the nature of transitional justice, as mentioned before. Scholars and practitioners distinguish between two different approaches: The retributive approach and the restorative approach. Both processes are built on the theoretical assumption of “jus post bellum”, or justice after war, which establishes a moral obligation of providing justice in the aftermath of going to war (Cochrane 2008:

158). The institutional models of retributive justice and restorative justice can be distinguished on the grounds of how they define justice. Justice can be either seen as striving for retribution for past crimes by holding former perpetrators accountable, or, on the other hand, "restoring relationships between the victim and the aggressor as a way of rebuilding personal and group respect" (Cochrane 2008: 158).

Advocates of retributive justice do not see retribution as opposing or alternate to reconciliation but they see it as a necessary precondition for reconciliation to start. In addition, the retributive approach concentrates more on the perpetrator than on the victim, and consequently, more on the past than on the future (Carey et al. 2010: 206). However, several international tribunals always stress the importance of the victim, and that trials are a form of victim empowerment. Manifestations of retributive justice are for example war crime tribunals, starting with the Nuremberg and Tokyo Trials after World War II (Cochrane 2008: 158), or more recently, ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY). Goldstone, one of the Chief Prosecutors at the ICTY as well as the International Criminal Tribunal for Rwanda (ICTR), emphasized in his article that he "[has] no doubt that in countries or regions where there have been egregious human rights violations, it is less likely that there will be an enduring peace without some attempt to bring justice to the victims." (Goldstone 1996: 488) He adds to this point of view that individualizing guilt, which is exactly what trials aim to do, avoids collective guilt of a particular group, ethnic, religious or other (Goldstone 1996: 488). He illustrates his opinion by describing the example of the diverse ethnic groups in the Balkans who have lived through numerous conflicts without ever getting real closure after crimes have been committed. In Goldstone's view this is the reason why war in the 90s erupted in the first place.

At the ICTY there have been lots of cases of successfully prosecuted high-ranking war criminals who received punishment for their crimes. However, lots of criticism has been raised about the lack of Serbian judges in the proceedings and the distant location where the trials took place, far removed from the citizens of the countries (Carey et al. 2010: 207). Besides that, David (2014) argues that citizens belonging to the Serbian ethnicity perceived the tribunal as biased against them and therefore often questioned its legitimacy. Similar criticism was raised in terms of the ICTR, where the Hutu majority felt they were unfairly treated. Other critics even claim that these war crime tribunals have been highly ineffective and that they did not contribute to reconciliation at all as they are only able to catch "the small fry rather than the big fish" (Cochrane 2008: 161). Also, in situations and conflicts where large segments of the population were involved in human rights crimes, such as the genocide in Rwanda for example, trying just a few perpetrators does not solve the whole problem. Despite these shortcomings, many policymakers and scholars believe that this is the way to go, bringing those to justice who committed the worst possible crimes. The prevalence of the retributive justice-approach was

prominently emphasized through the establishment of the International Criminal Court in 1998 as one of the main instruments for the international protection of human rights.

In comparison to retributive justice, restorative justice constitutes the alternative model for institutionalizing justice after conflict (Cochrane 2008: 162). As mentioned earlier restorative justice aims to focus not exclusively on the perpetrator but on the society as a whole to bring victims and aggressors together to reconcile. A popular example for restorative justice is the South African Truth and Reconciliation Commission (Quote Kofi Annan from book by Hayner). The TRC was installed because of people's wish to publicly tell the story of human rights abuses but also to engage in a healing process to move towards a future of a peaceful coexistence (Cochrane 2008: 162). The purpose of the truth commission was rather leaning towards the second goal of transitional justice, namely finding the truth than pursuing justice in a retributive way. The truth process was further facilitated through the granting of amnesties if former perpetrators confessed their crimes and admitted that they violated human rights. In some instances such as in the Truth Commission in Sierra Leone it is part of the restorative justice approach to actually apologize to former victims and show remorse (Carey et al. 2010). Numerous truth commissions were perceived as successful and as having more impact on reconciliation than their counterparts based on the retributive approach by trying to not focus on particular individuals or members of a group but by hearing all sides equally.

The study by Hayner (1994) tries to find out what challenges and limitations truth commissions face and what can be realistically expected that truth commissions are able to deliver. In her comparative study she analyzes success cases as well as failures of truth commissions in order to come to terms with what can be generically said about their effectiveness. Hayner found out that there are certain conditions that are more favorable to promote successful outcomes of truth commissions, one of the most important ones being that the government has to commit to improvements of human rights standards at the time of the establishment of truth commissions. Another finding that was striking was that because conflict origins and root causes of conflicts differ in the regions, truth commissions have to fit these different conditions and circumstances in order to be successful. Truth commissions should also always be accompanied by other institutional changes, so she sees the value in truth commissions in their complementary nature. In addition to the findings by Hayner, the article by Bakiner (2014) tries to shed light on impacts of truth and reconciliation commissions on government policies and judicial processes. His findings suggest that truth commissions actually do have an impact but rather through the indirect chain of civil engagement and participation. Increasing the amount of civil society movements is crucial for long-term judicial and political impact which emphasizes the importance of truth commissions. However, the author argues that the impact of truth commissions shouldn't be too exaggerated as their non-binding character limits their directly traceable effect.

Summing up, it can be said that both approaches do not necessarily have to constitute the opposite of one another. In various real-world examples institutions are built on both assumptions, such as in Rwanda and Sierra Leone. This complementary approach of having retributive as well as restorative elements in the reconciliation- and peace building process in post-conflict states might be more extensively used in the future when looking at the increasing trend in using these combined TJ mechanisms in various comments by UN personnel: "It is now generally recognized [...] that truth commissions can positively complement criminal tribunals, as the examples of Argentina, Peru, Timor-Leste and Sierra Leone suggest." (UNSC S/2004/616 2004: 9) Both approaches together increase the probability of the post-conflict state to experience a longer and stable peace in the country (Bakiner 2014; Lie et al. 2007), at least according to some studies about the effects of transitional justice. It has to be acknowledged at this point that critical reviews of the current state of the literature argue that so far there was an insufficient amount of studies conducted which are not only limited in their methodological varieties but also in their thematic breadth as they primarily focus on questions of moral considerations and legitimacy (Thoms et al. 2008).

1.3 No Peace without Justice?

After discussing which different types of transitional justice exist and what their advantages and disadvantages are, it is also essential to assess what the literature says about whether transitional justice should be applied in every case. From a moral point of view the case for transitional justice seems incontrovertible as holding perpetrators accountable, one way or the other, for the worst crimes against humanity, such as genocide and war crimes, is a process almost everyone intuitively agrees on. Also, as emphasized in the UN Charter, the general international consensus about the matter of transitional justice is that those responsible for grave human rights violations should be punished for their crimes. In addition, a number of scholars have argued that the international community has an obligation under international treaties and customary law to bring justice to victims by trying aggressors (Lie et al. 2007 1). Proponents of transitional justice mechanisms always stress the benefits of these measures, including the contribution to reconciliation, psychological healing and in way finding closure to what has happened, promoting human rights standards as well as the rule of law within the country and in addition sending a message to other states around the globe, and most importantly, establishing conditions for a peaceful and democratic future (Thoms et al.). Furthermore, scholars argue that bringing justice to post-conflict societies might be the essential component which strengthens long-term stability and peace (Rodman 2014). Advocates of transitional justice also believe that credible threats of punishment boost political reconciliation and encourage constructive political behavior (Thoms/Ron/Paris 2008: 21).

Critiques, however, claim that often times using transitional justice will lead to instability, triggering renewed violence by focusing people's attention on the past again. Some critics argue even that

transitional justice might stand in the way of negotiating peace settlements, pointing to the spoiler-problem (Cochrane 2008: 108-110). Snyder and Vinjamuri (2006) share the opinion that the only thing standing in the way of peace in Uganda is the threat that the International Criminal Court poses by pressing charges against LRA leader Joseph Kony and other high-ranking leaders. Feeling threatened by the investigations, the LRA will never stop fighting the government, so the argument in the article. The scholars further claim that in cases where the process of negotiating a peace settlement is still ongoing “amnesties can be highly effective in promoting peace and democracy” (Snyder/Vinjamuri 2006). It is argued that in order to rebuild post-conflict states amnesty to former criminals has to be granted to focus rather on the future than the past (Snyder/Vinjamuri 2003). In addition to these arguments, other critics of war crime trials argue that identifying perpetrators during the highly fragile time of transitioning from conflict to an uncertain future might trigger recurrence of violence as people are reminded once again of past crimes which might also reduce the likelihood of negotiated settlements to last (Licklider 2008).

Other scholars, like Widner (2001), warn of an overemphasis of transitional justice mechanisms especially in Sub-Saharan Africa as her study shows that they can only provide limited effects in fragile surroundings: “The lesson is one of caution in placing too much faith in law and courts in post-conflict transitions or in expecting quick results.” (Widner 2001: 64) Furthermore, the study by Olsen et al. (2010) shows that granting amnesties, meaning that individuals or groups accused of human rights violations will not be prosecuted by tribunals or truth commissions, is the most commonly used form of transitional justice in the aftermath of conflict. It is especially used in non-Western countries, with a particularly high number in Latin America. As numerous Latin American countries experiencing transitional phases from authoritarian to democratic systems are perceived as having now higher standards of human rights and the rule of law, it could be argued that granting amnesties and not engaging in any tribunals, might be the way to move forward, especially in highly fragile regions such as Sub-Saharan Africa where the danger of recurrence of violence is even more likely.

1.4 The Effects of Transitional Justice

Despite these changes in the international system the debate still persists about what the real impact of transitional justice on peace and stability in post-conflict societies is. Because human rights trials are relatively recent phenomena there is still general disagreement about strengths and weaknesses (Thoms/Ron/Paris 2008: 15). The study conducted by Lie et al. (2007) finds evidence, however weak and difficult to generalize, that retributive forms of justice, such as trials indeed lead to a longer-lasting peace in democratic as well as in non-democratic post-conflict settings. Restorative measures such as truth commissions and reparations can be strongly linked to an increase of the duration of peace in democratic societies, but produce on the other hand less significant results in non-democratic countries.

Thoms et al. (2010) argue that even though being of great importance in debates about appropriate peacebuilding measures in post-conflict societies, explicit studies about the effects and impact of transitional justice are still rare. Instead of conducting in-depth scholarship, most effects have to be assumed rather than analyzed. The authors also criticize that the literature tended to focus on a few already well-researched cases. Consequentially, the focus on a specific region might give insights into transitional justice impacts there but lacks to translate the findings to different contexts. Although the research has some obvious limitations, there are some findings that can be helpful in further evaluating possible effects of transitional justice.

One of the most significant findings about war crime trials has been made by Akhavan (2001) who concluded from his study that international justice efforts have been significant for peacebuilding in the Balkans. By using process-tracing of tribunal impacts he measured also, that the ICTY constitutes a milestone for integrating criminal accountability as an integral part of how to handle past crimes in international relations. In particular, he finds empirical evidence, however limited, that the ICTY contributed to a large degree to delegitimize Milosevic's leadership and helped raising public awareness among Serbian and Montenegrin citizens about the horrors taking place in Srebrenica (Akhavan 2001: 9). In addition, he sees a direct influence of the war crime tribunals ICTY and ICTR on the adoption of the Rome Statute and thereby on the establishment of the International Criminal Court. Thoms et al. (2010: 337) argue that the strength of Akhavan's study is its process tracing of the tribunal's impact on political decision-making, but on the other hand lacks considering alternative explanations and presents rather anecdotal evidence. Focusing on the same tribunal, Meernik arrives at a different conclusion about the impact of the ICTY. After controlling for alternative variables he concludes that there is little impact of the arrests and judgements of war criminals on societal peace and that instead his research suggests that actions taken by the EU, NATO and the U.S. had more significant effects. However, as the author acknowledges himself that there are some problems with his measurements and establishing casualty (Thoms et al. 2010: 337).

Despite single-case studies, some comparative studies have been also conducted, which either found weak causal correlation between any form of transitional justice mechanisms or non at all. What the vast majority of studies have in common is that usually transitional justice does not have any negative influence on post-conflict peacebuilding processes. Sikkink and Walling (2007) emphasize with their quantitative impact analysis of Latin American countries which used transitional justice mechanisms during transition-processes that pessimistic claims of skeptics are empirically unfounded and that human rights trials do not threaten democracy, increase human rights violations or prolong conflict. Similar outcomes in the case of Peru are produced by Burt (2009) who concludes from his findings that "[...] the argument is often put forward that criminal trials for human rights violations will reinforce old

cleavages. This does not seem to be the case in Peru, where the tribunal that prosecuted Fujimori was widely perceived as legitimate and where a majority came to believe that Fujimori was in fact guilty of human rights violations.” (Burt 2009: 405)

Even though most studies find that transitional justice has either positive or no effects at all, using the methodology of single case studies seems to produce different results. Akhavan’s and Meernik’s differing analyses of the ICTY for example ended in contradictory findings (Thoms et al. 2010: 351). This is why, qualitative methods such as cross-national comparisons and mixed methods research might be more feasible for future research on transitional justice.

2. Liberal Peacebuilding and Transitional Justice

2.1 Transitional Justice as an Integral Part of Peacebuilding

In one form or the other transitional justice mechanisms are now included in most peace processes and it has begun to dominate discussions about the “intersection between democratization, human rights protections, and state reconstruction after conflict” (Thoms et al. 2010: 332). That has been, however, a rather new development, as until very recently only a few researchers have perceived transitional justice as an element connecting justice, reconciliation and peacebuilding (Lambourne 2009: 29). Many scholars have rather focused their research on human rights concerns and legal proceedings. The shift from the context of societies shifting from undemocratic to democratic settings to being a part of peacebuilding measures in post-conflict states was initially defined by former UN Secretary-General Kofi Annan: “Effective rule of law and justice strategies must be comprehensive, engaging all institutions of the justice sector, both official and non-governmental, in the development and implementation of a single nationally owned and led strategic plan for the sector.” (UNSC 2004 S/2004/616: 9) Lambourne (2009) argues that in her opinion transitional justice has to go even further in its peacebuilding tasks by setting up structures, institutions and relationships to promote sustainability of peace, emphasizing that justice should not only be transitional but permanent.

2.2 Liberal Peacebuilding

Since the beginning of the 1990s there has been a trend towards internationalizing forms of transitional justice as part of post-conflict-peacebuilding policies (Allen/MacDonald 2013: 1). The establishment of the ICC is one of the main indicators for this development, many scholars argue. However, it has to be noted that while there has been an immense increase in internationally constructed justice mechanisms, traditional, locally installed justice has always been seen as an alternative within the transitional justice framework (Allen/MacDonald 2013: 5). Even with the establishment of various internationally-led war crime tribunals, room was always made for locally legitimized, traditional institutions such as Rwanda, Sierra Leone and East Timor. However, concerns have been raised that

“peacebuilding theory and practice reflect a particular liberal internationalist paradigm, one that relies excessively on two strategies – developing certain features of liberal democratic domestic politics – as pathways to peace.” (Sriram 2007: 580) As the majority of post-conflict states arguably has little or no experiences with democratic systems or liberal market economies, the emphasis on these strategies might be inappropriate in these settings (Sriram 2007: 581). Transitional justice mechanisms following this paradigm are seen as instruments of liberal peacebuilding in post-conflict societies. The theory of liberal peacebuilding is based on the assumption of democratic peace which claims that democracies do not fight other democracies and therefore establishing democratic states around the world will lead to peace. In addition to that, liberal peace is believed to be achieved through political and market liberalization (Nadarajah and Rampron 2014, Paris 1997).

Being part of internationally-led peacebuilding strategies, international tribunals are criticized mainly in the relevant literature for lacking local legitimacy and forcing a Western conflict reconciliation model on states. In particular, transitional justice institutions “are often linked explicitly to democratization and that, like democratization they may destabilize post-conflict countries.” (Sriram 2007: 586) On the other hand, internationally installed tribunals, as a part of liberal peacebuilding measures, are by definition built on democratic norms such as the rule of law and human rights because the majority of these institutions is either built by Western, developed states or by the United Nations which also highly commits to international human rights and peace. Paris (2010) rejects the criticism that conducting peacebuilding under liberal norms and values does not lead automatically to instability and the recurrence of violence in post-conflict settings. According to him, destabilization comes mostly from failures of disarmament of rushed elections but cannot be traced back to a flawed theoretical foundation. This is why also international tribunals should in practice not lead to any violent outbreaks. The opposite even – if tribunals indict leaders and sentence them to serve prison terms, it is more likely that having spoilers behind bars might lead to an increase in stability.

Through the reasons mentioned above, tribunals under the supervision of the international community can be also expected to be most successful in establishing stable peace in post-conflict states as their structure and purpose are directed at a commitment to international human rights and the rule of law. Therefore, the hypothesis following the theory of liberal peacebuilding is:

H1: Internationally established and run tribunals are most effective in achieving stable peace in post-conflict states, all other relevant variables being equal.

2.3 Criticism of Liberal Peacebuilding and the Theory of Hybridity

As mentioned before, critics of liberal peacebuilding are of the opinion that the theory rather leads to crisis than to peace as the decades after the end of the Cold War were dominated by this approach and

liberal peace- and state building missions failed in a majority of cases. Nadarajah and Rampton (2014: 52) speak of "an array of problems, including exacerbated conflict dynamics, developmental failure, and localized and transnational resistances, some violent, has generated profound anxiety, if not crisis, for the liberal peace project, which has not abated despite rethinking and reformulating developmental, peacebuilding, and humanitarian programming [...]". Furthermore, liberal peacebuilding has been criticized widely as a hegemonic project that "reproduces power relations and seeks to discursively dominate the recipient post-war or failed state." (Goede 2015: 22) In addition to that critique, Richmond (2012) mainly argues that liberal peacebuilding often ignores local needs and demands and rather focuses on establishing a Weberian state. MacGinty (2008) adds that Western peace-making methods also limit the scope of alternative, indigenous approaches to rebuild society and achieve lasting peace by suppressing attempts of local ownership. Summing up, critics of liberal peacebuilding see this theory as having failed to keep its promise. Top-down practices of liberal peace are perceived as not feasible to diverse cultural settings which led to a call for more inclusion and participation of local population in peacebuilding activities.

The dispute between advocates and critics of liberal peacebuilding has produced interest in alternative forms and types of peacebuilding. A possible compromise in the argument over effective peacebuilding is the theory of hybridity which describes the interaction of local and liberal components. This approach aims to combine elements of international, liberal peacebuilding and in addition include local conflict reconciliation approaches. The assumption hereby is that in order to avoid local rejection of internationally held tribunals, the local population has to be more extensively included into the process of rebuilding society: "A supposedly novel and emancipatory turn to inter-connected hybrid, post-liberal, local, everyday and popular peacebuilding approaches has been ventured, claiming to eschew the orthodoxies and statist, territorial logic of mainstream liberal peacebuilding and instead locating the possibility of peace in the agency of the local and the everyday, and hybrid formation of liberal (international) and non-liberal (local) institutions, practices and values." (Nadarajah and Rampton 2014: 50) Case studies have suggested that these hybrid outcomes may be a more promising, future direction for peacebuilding especially in post-conflict reconstruction as they claim more local legitimacy but on the other hand also include elements of Western democratic states (Goede 2015). As this approach holds a widely popular position in current scholarship and practice, this research project aims at also testing its value within transitional justice. Especially testing hybrid tribunals, as they are the nowadays most common form of transitional justice institutions, is of high significance.

H2: Hybrid trials are more successful in establishing stable peace in post-conflict states than only internationally installed tribunals (all other variables being equal).

2.4 Stable Peace without Justice? The Case for Amnesties and Impunity

Coming back to the discussion in the previous chapter about whether transitional justice in forms of tribunals and truth commissions rather lead to more instability and have no effect whatsoever on higher standards for the rule of law and human rights, it would be also interesting to see if the decision for granting amnesties to former perpetrators might have more stabilizing effects in post-conflict settings. In order to make sure that transitional justice matters or has any effect, one case will be selected in which no transitional justice mechanisms were present and where there was an active decision for an amnesty law. If this case produces positive outcomes on the dependent variable, namely it leads to stable peace in post-conflict surroundings, then the following H3 can be seen as valid and any peacebuilding theories proposed so far are probably not entirely feasible for transitional justice. Of course, it always depends on the case selection and as in this thesis there will be only a limited number of cases selected, generalizations are especially difficult to make.

H3: Transitional Justice does not matter for establishing stable peace in post-conflict societies.

The competing hypotheses will be tested through qualitative case studies. For every established category there will be one case fitting the criteria of international-, hybrid and non-trials. The case that produces the best outcome on the dependent variable might be based on the most feasible, and in this context, sufficient theoretical foundation. However, as there will be only a limited number of three cases, generalizations are problematic.

III. Methodology

3. Controlled Comparison

3.1 Operationalization

As already indicated in the previous chapters, the independent variable will vary to find out which concept of transitional justice regimes is most effective in establishing peace. The independent variables will be categorized as follows: a) international criminal tribunals b) hybrid courts c) no transitional justice. Classified as international criminal tribunals will be all tribunals that are exclusively run by external forces which can be multilateral partnerships as well as single states. Hybrid courts, in comparison, can be considered any attempts that are made to bring international expertise and local ownership together and establish a transitional justice system in accordance with both approaches. The last category of “no transitional justice” will be assigned to cases in which conflict occurred and crimes against humanity, as defined by the Rome Statute of the ICC, meaning “any of the following acts when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack: a) Murder b) Extermination c) Enslavement d) Deportation or forcible transfer

of population e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" (UNGA, Rome Statute of the ICC 1998, Article 7) were committed but where no attempts were made to investigate these crimes and bring justice to the victims. That can also be in form of amnesty laws.

The dependent variable in this research design is "stable peace" which follows the concept of Johan Galtung's positive peace describing not only the absence of violence but also the establishment of a functioning government, including the rule of law, establishment of a market economy and reconciliation of the conflict parties. As the aim of transitional justice is defined as "an effort to re-establish a system of fairness following human rights disasters in order to move society away from the violence and instability of the past towards a more stable and less violent future. The underlying assumption of transitional justice is that violence and instability result from past injustices must be addressed before progress can be made towards a more peaceful and stable society." (Carey/Gibney/Poe 2010: 203), the dependent variable used in this research design fits the purpose of the research objective, so that the validity is high. Advocates of accountability through retributive justice usually make three claims about the effects of trials (Snyder and Vinjamuri 2004: 17): (1) Trials will prevent possible future perpetrators from committing crimes, or put in other words, trials will have deterring effects due to the threat of punishment, (2) Trials will strengthen the rule of law by showing the post-conflict society how to resolve conflict through judicial means. As the rule of law is a necessary instrument to protect human rights within the country, both concepts influence each other, (3) According to the concept of retributive justice, trials also emphasize the guilt of individuals and therefore transfer the burden of responsibility from ethnic or political groups to a few perpetrators. It is assumed that this shift of guilt to individuals might put an end to future circles of violence (Snyder and Vinjamuri 2004: 17).

The research design is based on the assumption that transitional justice influences peace through the following supposed process: Transitional justice in form of tribunals will lead to the trying of individuals who were accused of war crimes and human rights violations. Assumed that the trial is impartial and fair, it will lead to convictions of main figures widely known by the population. If the population sees that main perpetrators are brought to justice, it will raise awareness of the criminal offenses that have been committed, which will have deterring effects on possible future perpetrators as they might be discouraged to get involved in human rights violations. This consequentially leads to an improvement of human rights standards. Another effect will be that if main militia leaders, for example, are sentenced to serve prison terms that also means that they cannot occupy important government positions in the future. That in turn will lead to more stability and less violence. By seeing and maybe being also included in the judicial proceedings local judges will be trained to correctly apply laws and effectively fulfill administrative tasks. That will lead to a higher standard of the rule of law.

If through the controlled comparison it is concluded that no transitional justice is most effective in establishing stable peace, then the process described above is flawed and other variables might be responsible for having an effect on peace.

In addition to what is already outlined in the hypotheses, Synder and Vinjamuri (2004: 17-18) point out that both domestic and international trials can contribute to positive effects on stable peace, but that some observers argue that domestic trials have a greater impact on local reconciliation, as they are situated in the countries where the crimes took place. International trials, on the other hand, are operating under high universal standards of justice and might therefore be fairer and more professional. This is why, hybrid tribunals combining both approaches, are expected to accomplish both goals, pursuing justice locally while maintaining international standards of dealing with human rights violations (Snyder and Vinjamuri 2004: 17-18). Granting amnesties or adopting no transitional justice mechanism might be also likely to be a necessary first step in the process of achieving stable peace, the rule of law and higher human rights standards, especially when there is no decisive military victory (Snyder and Vinjamuri 2004: 18). In an unstable environment with potential spoilers trying to sabotage peace negotiations, criminal prosecutions might lead to recurrence of violence and political unrest, whereas leaving the past in the past might help the further development towards peace.

The most important attributes of stable peace in the context of this thesis, which will be operationalized, are 1) prevention of recurrence to violence 2) the status quo of human rights, and 3) a functioning rule of law. It should be noted at this point that “democracy” is not part of the dependent variable as that would already indicate a tendency towards the specific goals of liberal peacebuilding which might distort the measurement of the different categories. To assess the effects of these three different strategies, the countries where the transitional justice mechanisms were applied are examined. The first attribute of the dependent variable will be measured with data generated by rankings of Freedom House which measure the country’s stability, indicate if political violence has broken out and give a rough overview of the status of democracy, civil liberties and the rule of law. Starting from the time of the state’s first recorded instance of civil war ending, it will be measured how long recurrence of violence will be prevented. To be able to validly argue for a direct effect of transitional justice, every post-conflict state will be seen as successful in preventing violence from recurring which has no violent outbreaks within a time period of five years after the end of the conflict. Assessing the trend over the projected time frame helps to analyze if these indicators are correlated with the type of transitional justice used in each case.

The second and third attribute “the status quo of human rights” will be measured with reports from Amnesty International, Human Rights Watch, Freedom House, the United Nations High Commissioner of Human Rights and other UN organs, as they are interrelated as indicated before. The third attribute of the dependent variable, the “rule of law”, will be defined in terms of the existence of impartial trials,

the right to be presumed innocent until proven guilty and in terms of the process by which any laws are enacted, administered, and enforced being transparent, fair, and efficient.

The hypotheses that were developed in the theoretical framework will be tested using the method of controlled comparison. According to the proposed categorization of the independent variable, I aim to select cases that are as similar as possible in regard to control variables. Variables that have to be controlled in order to carry out a valid comparison are inter alia (1) so-called conflict characteristics (Meernik et al. 2010: 317-318), meaning that the longer and the more violent a civil war has been, the more difficult it will be to achieve peace and to improve human rights practices; (2) a history of democracy, because it can be assumed from the literature that states that already experienced democracies or democratic settings are more likely to protect human rights than non-democratic systems and might also adapt faster to post-conflict peacebuilding measures; (3) UN intervention, as it will provide further assistance for stabilizing the post-conflict environment; (4) Economic prosperity, as research has also shown that economic growth and prosperity influences employment rates, social welfare needs and leads to foreign investment (Meernik et al. 2010: 318). If the country has a certain amount of wealth it can be assumed that it is less likely to fight over property or over land rights and so forth. So in general the country would be less likely to return to conflict situations. In regard to the economy what should also be controlled for is the amount of development aid entering the country after the conflict ended.

3.2 Limitations

Using a qualitative approach to analyze effects of transitional justice mechanisms, even though having some advantages, also has its limitations. It is hard to counterfactually argue what might have happened if trials, mixed or international, had been applied in the situation. It is also not possible to find out whether successful consolidation of peace happened despite complicating effects of trials, or if the trials themselves had the positive impact on peace in the country (Snyder and Vinjamuri 2004 19). Also, the following research only looks at short-term effects, so it cannot be analyzed what might happen in the long run, and if some transitional justice mechanisms will actually need more time to fully have an impact on society. Despite the limitations mentioned before, it should also be noted that it is challenging to isolate effects of the courts from other peacebuilding measures. Another final limitation of this research is that there are only three cases analyzed, so no quantitative, statistical analysis has been conducted which makes it hard to generate general assumptions from this research.

3.3 Case Selection

From their research on impacts of transitional justice trials in Latin America, Sikkink and Walling (2007: 442-443) concluded that there was no case where democracy has been undermined or the human rights



situation has been worsened because of the choice to use trials. However, the authors raised the question whether there was some kind of Latin American exceptionalism as Latin American countries have a strong tradition of the rule of law and strong regional human rights regimes compared with other developing regions. Current sceptics of transitional justice trials do not limit their arguments to specific regions but make statements about dangers of transitional justice everywhere in the world (Sikkink and Walling 2007: 443). The authors are of the opinion that in order to continue a nuanced debate about effects of transitional justice, it should be researched under what conditions trials can contribute to improving human rights and enhancing peace, regardless of time and place. Mutua (2015: 5) on the other hand is of the opinion that “Dogmatic universality is a drawback to an imaginative understanding of transitional justice.” This point of view emphasizes the importance of context and location of the post-conflict state in transition. The following case selection will focus on the Sub-Saharan African region to find out whether transitional justice also works after civil wars and not like in the American cases maybe only within the transition from authoritarian regimes to democracies.

In consideration of all control variables and the defined categories for the independent variables, the case selection constitutes a difficult task. As in the literature there are some widely researched cases such as the ICTY and the ICTR that have produced contrasting findings in several articles in regard to providing stability and peace in post-conflict societies (see Licklider 2008, Snyder and Vinjamuri 2003, David 2014) the following research wants to focus on the African region, as there has been relatively little research conducted in regard to effects of transitional justice.

	International Criminal Tribunal: Democratic Republic of Congo	Hybrid Court: Special Court for Sierra Leone	No Transitional Justice: Burundi
Crimes Against Humanity	Yes (War Crimes, Crimes Against Humanity)	Yes (War Crimes, Crimes Against Humanity)	Yes (Genocide, Crimes Against Humanity, War Crimes)
Civil War	Yes (1999-2003) conflict recurred	Yes (1991-2002)	Yes (1993-2005)
Former Colony	Yes (Belgian)	Yes (British)	Yes (Belgian)
History of Democracy	No	Yes (1961-1967)	Constitutional Monarchy since 1959
UN intervention	Yes (MONUC since 2003)	Yes (UN Peacekeepers, British intervention)	Yes, (Peace Talks initiated by Former UN Secretary-General Boutros-Ghali, UN mission since 2004)



Economic situation	Very resource-rich country, besides this immense potential people belong to poorest in the world, lowest, nominal GDP per capita, development aid from UN mission	Resource-rich, but high unemployment, degraded economy; massive development aid from outside since end of civil war	Fifth poorest country in the world; development aid from UN
Additional Transitional Justice Mechanisms	No	Yes, Truth Commission	Local Courts partly dealing with past crimes
Instability after civil war	Yes	Yes	Yes

The variables that differ within the case selection are assumed to not have a severe influence on the outcome of the comparison. In terms of the variable “history of democracy” it can be argued that this factor might have a bigger impact on the effectiveness of building democratic institutions within the state, but might to a lesser degree influence human rights standards. Also, there have been various examples in history that states do not need a deep-rooted prehistory of democracy to effectively build a functioning democratic state. One example is Germany.

The only factor that might be significant and cannot be controlled for otherwise is that in Sierra Leone, the Special Court was not the only transitional justice mechanism deployed. A Truth and Reconciliation Commission existed in addition. However, the duration of this commission was rather short (less than a year) compared to a longer existence of the Court, which might limit the influence of the TRC on the situation in post-conflict Sierra Leone. Especially considered that the TRC, as mentioned in the previous chapters are said to have a greater effect on reconciliation than on human rights standards or the rule of law in the country.

3.4 Analysis

3.4.1 The ICC in the Democratic Republic of Congo

The case selected for the International Criminal Court, as a purely international transitional justice mechanism, is the Democratic Republic of Congo. The transitional justice process following the extremely bloody civil war resulted in a rather limited number of convictions. After the Ituri Conflict ended in 2003, five cases have arisen from the situation in the DRC (Okafor and Ngwaba 2015: 98). Thomas Lubanga Dyilo was the first one convicted by the ICC and sentenced to 14 years imprisonment. Other trials against key players in the Ituri conflict are still ongoing. Even though the conflict in Congo is still ongoing, this thesis will focus on the ethnic civil war from 1999 to 2003 and how the ICC dealt with the situation in regard of transitional justice mechanisms.



The establishment of the International Criminal Court (ICC) marked a shift from using ad hoc and periodically installed criminal tribunals to administer international criminal law (Simpson 2008: 73). Numerous scholars argue that the set-up of an international court with the purpose of bringing those to justice who are responsible for crimes against humanity, war crimes and genocide, was a unique achievement in itself (Simpson 2008: 73). Since the adoption of the Rome Statute in 1998 and the subsequent entry into force in 2002, the Court has been subject of heated controversy (ICC 2015). Even though repeatedly emphasizing that the ICC “shall be complementary to national criminal jurisdiction” (Rome Statute of the International Criminal Court 1998: Article 1) critiques claim that much of its controversy comes from the complex mandate of the ICC: “To translate global legal obligations into functional justice at the local level.” (Simpson 2008: 73) Some challenges that the ICC faces in this respect are “demands concerning the dynamics between the Court and victims and affected communities; the challenges of investigation and enforcement in the context of reliance on national actors; and the limitations of the Rome Statute’s incorporation into domestic law.” (Simpson 2008: 73) The court, being set-up as a purely international permanent judicial institution, has been primarily criticized for its exclusive focus and involvement on the African continent, which led to accusations of neo-colonialism. Simpson (2008: 73) pointed out that “it is hardly surprising that these debates centre on the relationships among local, national and international justice approaches.” Furthermore, sceptics of the Court often criticized its embodiment of Western values and assumptions about how justice has to work (Okafur and Ngwaba 2015: 91-92). These critiques point to the tensions between the claims of international justice and local attempts to deal with past crimes to build peace and to achieve reconciliation (Simpson 2008: 73).

In this respect, the Congolese situation is of historic significance for the ICC as it constitutes the first case of trying a suspect accused of crimes against humanity (Clark 2008: 39). In June 2004, the ICC Prosecutor, Luis Moreno Ocampo, opened the first investigation in the DRC against Thomas Lubanga Dyilo, leader of the Iturian rebel militia *Union des Patriotes Congolaise (UPC)*. The trial was set up because of international pressure on the Congolese government to refer cases of mass crimes to the ICC. Under that increased pressure, former Congolese president Kabila referred the situation to the Office of the Prosecutor (Clark 2008: 39).

The situation in the Eastern Part of the Congo came to the attention of the international community through reports by the UN and by various human rights NGOs. As a former Colony of Belgium, the area of Central Africa, that is today called the DRC, was exploited severely even by colonial standards (Freedom House – Congo 2005). After the withdrawal of Belgian forces, Joseph Mobuto came into power, enriched himself and started a regime of suppressing the Congolese people heavily. Through his backing of Rwandan Hutu militia leaders during the Rwandan genocide, he lost all support he had left



and was overthrown by Ugandan and Rwandan military forces. The head of the inner-state rebellion Laurent Kabila was installed as new leader of the country. As a subsequent armed conflict erupted shortly after the installment of the new rule, Laurent Kabila was assassinated, which led to the appointment of his son Joseph Kabila as his predecessor. The second Congo War began in 1998 and involved the government forces of the DRC, which were supported by Angola, Zimbabwe, and Namibia, fighting against several rebel movements backed by Uganda, Rwanda and Burundi (Human Rights Watch 2006). Despite the signing of the Lusaka Peace Accords in 1999, it took the eight countries involved until the end of 2003 to withdraw all military troops, which, however, did not result in the end of the fighting. Local surrogates carried on the battles of national and international actors in the northeastern province of Ituri (Human Rights Watch 2006). Due to the final peace accord in 2002, the DRC was run by a transitional government headed by Kabila before elections in 2005 took place (Freedom House – Congo 2006).

The situation in the DRC continued to be unstable, with repeated eruptions of violence, especially in the Ituri region, from which reports of militias killing, torturing, raping and abducting civilians to forced labor reached UN member states on a monthly basis (Freedom House - Congo 2006). Human Rights Watch reported the death of at least 5000 civilians being killed in the Ituri region, only between July 2002 and early 2003 (Human Rights Watch 2005). The UN peacekeeping mission in the Congo is one of the largest in UN history but still failed to stop the ongoing fighting between different ethnic militia groups and protect civilians, as there have been reports about sexual harassment and exploitation by the peacekeeping forces themselves (Amnesty International 2014/15: 128-129). The war also evoked competition over controlling the DRC's diamonds and other mineral wealth which was also emphasized in the 2004 report by the UN peacekeeping forces who claimed that violence in the Ituri region will persist until the government regained control over the natural resources again (Freedom House - Congo 2005).

After years of severe violence and crimes committed against civilians in the DRC, impunity for these grave international crimes has been one of the major obstacles to peace and stability, according to Human Rights Watch (Human Rights Watch 2011). New acts of violence continue to be committed with no real consequences for the perpetrators, besides the trials by the ICC. As of today, there are currently five cases investigated in the DRC by the ICC. Human Rights Watch commented on the cases in the DRC as being "mixed, at best" and go on by saying "Investigations in Ituri and the Kivus have not yet demonstrated a coherent strategy for bringing those most responsible to account for the gravest ICC crimes committed in these regions. The ICC's prosecutorial strategies in DRC have also raised questions as to the ICC's independence and impartiality. Additional investigations are necessary to ensure that the ICC's legacy in DRC will be one of meaningful and credible justice." (Human Rights Watch 2011) As



this thesis tries to investigate which effects the ICC, as a representative for a purely international transitional justice mechanism, had on the DRC where the charges have been pressed, the focus is first on the year 2006 when Lubanga was taken into custody in The Hague, and then rests on the five-year development afterwards, until 2011, when the Court heard the closing arguments in the case.

The ranking by Freedom House from 2006 to 2011 ranged steadily around a 6 (1 being the best possible score, and 7 being the worst) with only minimal changes. When looking at the situation before Lubanga was taken into custody, it was characterized by widespread instability and violence due to ethnic rivalries within the transitional national power-sharing government. The ICC started to take actions against Lubanga in the same year when elections were about to take place, which marks an extremely unstable time as it was decisive for the country's future. In 2007, the year following the elections in the DRC, Freedom House changed its rating from a 6 to a 5.5 in general, and improved the score for political rights from a 6 to a 5 "due to the holding of successful presidential and legislative elections in 2006, the country's first in 40 years" (Freedom House – Congo 2007). However, Freedom House also noted that despite the relative success of the elections, that the stability under the new elected representatives remained uncertain. Troops of the government and rebel militia forces committed serious human rights violations during 2006 and 2007, despite the arrest of Lubanga by the ICC and the presence of the UN Organization Mission in the Democratic Republic of the Congo (MONUC). In the Freedom House report of 2008, the DRC received a downward trend again due to the forced exile of opposition leader Jean-Pierre Bemba and the continuation of grave human rights violations. The freedom house rating dropped even further in 2009, as political violence erupted, including a police crackdown on the Bundu Dia Kongo movement and the assassination of an opposition politician in July. In the same year the ICC continued to pursue cases in the DRC against rebel leaders Mathieu Ngudjolo Chui and Germain Katanga, as well as the exiled opposition leader Bemba (Freedom House - Congo 2009). It was also noted that despite the violence in the Eastern part, most other parts in the DRC were relatively stable (Freedom House – Congo 2009). Besides, the relatively positive developments, in the year after the Congo received another downward trend due to harassment of human rights groups in the country issued by the government and an increasingly dangerous situation for journalists to report freely (Freedom House – Congo 2010). In 2011, the situation in the DRC remained unchanged. Heavy violence broke out in the Eastern provinces again at the same time as the celebration of the 50th year of independence. From the reports analyzed so far, atrocities have occurred steadily in the DRC without a strong decline when ICC investigations started. It can be presumed that at least in the DRC, the international court did not have any impact on recurrence of violence, which is in line with studies conducted before finding no real effects of trials on peace and security.



In terms of human rights and the rule of law, UN reports draw a similar picture. In the concluding observations of the UN Human Rights Committee in 2006, there were only three positive aspects of the situation in the DRC mentioned, namely the attempt of a democratic transition and the State party's efforts to enhance greater respect for human rights by inaugurating a legislative reform program for the judiciary and thereby strengthen the rule of law (UN Human Rights Committee - DRC 2006: 2). Furthermore, the Human Rights Committee refers to the DRC's cooperation with the ICC as a positive development and encourages the state to pursue that path by endorsing the draft law on the implementation of the Rome Statute. In addition, the DRC established the National Human Rights Observatory for protecting and promoting human rights in the country. However, there were numerous concerns raised about the situation of human rights and the rule of law, inter alia that international treaties such as the Covenant on Civil and Political Rights have not been translated into national law, which led to ill-trained judges in lawyers and besides repeated assurances by the State Party to improve the situation. Widespread impunity for serious human rights violations is still the norm, even though the identity of the perpetrators is oftentimes known (UN Human Rights Committee – DRC 2006: 3). Numerous UN documents also noted that in 2006 there was still persistent discrimination against women, leading to a situation in which women did not enjoy equal rights to men in areas such as political participation and access to education and employment, as well as continued legislation of forced marriages (UN Human Rights Committee – DRC 2006: 3). The situation for the rights of children is among the worst in the world with persistent reports by human rights NGOs about trafficking of children, especially for reasons of sexual or economic exploitation and forced recruitment of many children into armed groups (UN Human Rights Committee – DRC 2006: 3). In regard to the situation of the judiciary, the continued existence of military courts is one of the primary causes of concern as there is a lack of fair and impartial trials as well as a steady misuse of these military courts for ordinary offences (UN Human Rights Committee – DRC 2006: 6). Judges in the entire country are accused of being involved in corruption, which is partly traced back to the low pay they receive for their work (UN Human Rights Committee – DRC 2006: 6). In the report of the independent expert of the UN, the budget allocation for justice in 2005 and 2006 was insignificant, and just about 0,6 per cent (UNGA 2006: 21). According to the report issued by the UN General Assembly the situation of the rule of law in 2006 is summarized as: "The high crime rate in the Democratic Republic of the Congo, the disturbing number of offences committed and the impunity, which encourages repeat offences, compound the impotence of the national courts" (UNGA 2006: 22). It is further noted that an institution such as the ICC is necessary in cases like this, but of course cannot take care of all crimes and violations of human rights committed: "What is needed, therefore, is a mechanism that would guarantee not only the effective suppression of crimes covered by the Rome Statute [...] but also the administration of justice and an all-out campaign against impunity." (UNGA 2006: 23) These indications show that the ICC is seen as a



court of last resort as the judiciary in the DRC is notably not functioning, and has to be accompanied by peacebuilding measures which would help rebuild the justice sector in the country. In addition to investigations of the ICC, the report also shared recommendations about establishing a special international criminal tribunal or joint criminal chambers to actively and further fight impunity in the DRC.

The development from 2007 to 2009 in regard to the situation of human rights can be described as mixed at best, with some, but limited, progress being made in areas such as the administration of justice, by giving military tribunals less power in terms of jurisdiction and the further cooperation with the ICC, whereas in most other areas, such as human rights including widespread sexual violence, continued fighting by armed militias in the east, and the recruitment of child soldiers. The unstable situation in the DRC prevents real impact of peacebuilding efforts. In the UN Progress Report of 2007 the unstable situation is partly traced back to the unwillingness of the DRC to investigate crimes that have been committed between 1996 and 2002, which has led to the resurfacing of some war criminals during the phase of reconciliation and hold high positions in the State administration and the new army forces (UNGA 2007: 6). This position emphasizes again that the United Nations follow the "no peace, without justice"- approach, seeing any attempt of leaving crimes unpunished as morally indefensible.

In the annual report of the High Commissioner of Human Rights 2009, the situation in the DRC is characterized as being alarming due to extreme, ethnically-related violence: "From his meetings and observations, the Special Adviser concluded that there was cause for deep concern regarding the grave human rights and humanitarian situation in North Kivu, including the risk of genocidal violence, with implications for the entire subregion. Extreme ethnic polarization and hatred have become associated with the conflict in the Democratic Republic of the Congo. [...] The likelihood of ethically motivated killings by armed groups and the escalation of genocidal hysteria among the civilian populations are factors that must be taken seriously and addressed in earnest." (UNGA 2009: 13) The statement about the possibility of genocide in the DRC can be seen as an indication that stability in the country has rather increased than decreased.

The main human rights development identified in the report by the High Commissioner of Human Rights in 2010 are the structural and politically motivated human rights violations, including arbitrary executions, rapes, random arrests and detentions, torture, inhuman treatment of civilians, especially of women and children, committed by all armed groups in the conflict (UNGA 2010: 4). The situation for human rights defenders and journalists remains dangerous. Since its establishment in 2006, the independent national human rights commission has not been functioning so far. Also, a national implementation legislation for the Rome Statute has not been passed, which would contribute to setting coherent international criminal norms in the area of crimes against humanity (UNGA 2010: 14). In the

follow-up report published in January 2011, the High Commissioner for Human Rights notes that "no significant progress has been made in the structural reforms that are essential to improving the human rights situation in the Democratic Republic of the Congo." (UNGA 2011: 1-2) In addition to that, Amnesty International submitted a statement to the Human Rights Council in 2011, that the DRC urgently needs a reform of its judicial sector to actively fight the culture of impunity in the country. Therefore, it is argued that a long-term strategy is needed with technical assistance provided by the Human Rights Council (UNGA 13.09.2011: 2-3). This statement further emphasizes that prosecuting just a few individuals will not solve the problem in depth. Investigations by the international court will not have an impact if they fail to be accompanied by further peacebuilding measures and justice reform strategies.

In the report of the High Commissioner for Human Rights published in January 2012, the situation in the DRC in the year 2011 is characterized by widespread human rights violations in the run-up to the presidential and legislative elections against political opponents and journalists. The State institutions, such as the judicial system and the security forces, still remain weak, leading to corruption and impunity for human rights violations (UNGA 2012: 6-7). However, in comparison with the years 2009 and 2010 some progress has been made by the government, for example in establishing the initiative to protect civil liberties and the creation of a protection cell for human rights defenders. There was also some improvement noted in trying fighters of the militias for human rights violations. It is however questionable if these developments can be traced back exclusively to the investigations by the ICC. Maybe these somehow positive developments are more the sum of combined efforts by UN peacekeeping missions, the continued reporting by human rights NGOs about serious human rights violations, measures taken by the UN High Commissioner for Human Rights and the increased pressure on the government in the DRC to implement recommendations. Justice mechanisms should always be accompanied by peacebuilding efforts and reform policies for the national justice sector to be truly effective.

One thing that should be noted is that despite the severe violence, small steps have been made in the right direction. This week for example the parliament of the DRC voted for national legislation of the Rome Statute of the ICC. This long-awaited action, which has been promoted already in 2005 and 2006 in reports by NGOs and the UN will allow prosecution of grave crimes domestically (Global Justice 2015).

3.4.2 The Special Court for Sierra Leone

The case selected for hybrid courts is Sierra Leone. The Special Court for Sierra Leone was established in 2002 as the result of a request to the United Nations in 2000 by the Government of Sierra Leone, namely by President Kabbah, for a special court to address serious crimes against civilians and UN



peacekeepers committed during the country's decade-long (1991-2002) civil war. The domestic justice system of Sierra Leone lacked necessary capacities and resources at that time to effectively try former perpetrators and those responsible for human rights violations (Human Rights Watch 2004: 1). Negotiations between the UN and the Government of Sierra Leone on the structure of the court and its mandate, resulted in the world's first hybrid international criminal tribunal. It was the first modern international tribunal to be located in the country where the crimes took place, and the first to have an effective outreach program on the ground. The Special Courts Statute included both domestic and international crimes as opposed to only international crimes such as in the case of the ICTY and the ICTR (Human Rights Watch 2004: 2). The mandate of the Court was to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996" (Cited from Mieth 2013: 14). There were eight judges appointed to conduct the trials – from Sierra Leone, Canada, Austria, Gambia, the UK, and Nigeria, which also marked a milestone in transitional justice-history as it was the first human rights tribunal to sit UN-appointed international judges alongside local judges.

The goal of the Court was to be cheaper and faster than its predecessors, the ICTY and the ICTR. Thirteen people in total were indicted by the Court, with eight of them serving their sentences in a prison in Rwanda (Mieth 2013: 14). Three trials were held in Freetown and the accused individuals belonged to either one of the main militias participating in the war. However, the most significant trial against former Liberian head of state Charles Taylor took place in The Hague which was due to the instability of the political environment and the fear that Taylor might have the possibility to sabotage the trial. The Court was also the first tribunal dealing with the crime of recruiting child soldiers and gender based crimes such as sexual slavery by treating them as crimes against humanity.

The establishment of the Court followed an extremely devastating 11-year lasting civil war, which was marked by widespread human rights abuses against the unarmed population (Gell 2012: 12). When the Revolutionary United Front (RUF) launched a guerilla campaign from neighboring Liberia to overthrow the Sierra Leonean government, numerous brutal attacks on civilians were reported, which were characterized by the RUF's inhumane practice to systematically cut off limbs of adults and children with machetes and by widespread sexual violence against women and girls (Gell 2012: 12). While the RUF together with the Armed Forces Revolutionary Council (AFRC) were mainly responsible for human rights violations, the government forces and the Civil Defense Force (CDF), supported by the government were also found guilty of various abuses, ranging from killings, torture and rape to the recruitment and use of child soldiers (Gell 2012: 12-13). By the time, the war was declared to have officially ended in January 2002, approximately 60.000 people have been killed (Dougherty 2004: 315) and almost half the population was displaced as a consequence of the war (Gell 2012: 12). The end of

the civil war was reached by a negotiated peace agreement, which was multiple times violated before finally leading to relative stability. After violence finally stopped, Sierra Leone was labeled "the worst place in the world to live" (Cited from Dougherty 2004: 316) by the World Bank and ranked last on the 2002 Human Development Index and in many other factors measuring the quality of life. In addition, Sierra Leone had one of the world's lowest GDP with 68 per cent living under the national poverty line (Dougherty 2004: 316). The political development on the other hand showed at least some progress, as Sierra Leone remained peaceful since 2002 with three democratic elections held until today, which were largely perceived as free and fair (Mieth 2013: 13).

Studies conducted about the effectiveness and success of the Court have produced mixed findings. Whereas some scholars celebrate the court as great achievement, others are more skeptical and claim that still constitutes a rather Western liberal approach on how to deal with past crimes. Through conducting interviews with the local population in Sierra Leone, Mieth (2013: 11) found out that the people are used to deal with crimes using restorative approaches to justice, mostly compensating victims with material goods. Numerous respondents felt indifferent about the Court in Sierra Leone as they were not looking for justice per se but instead wanted to move on (Mieth 2013: 12). Concluding from her research she also found no direct causal connection between the trials and the peace. However, some respondents saw the Court as a contributor of ending the conflict. In contrast to these findings, Jalloh (2011) defends the court's impact on peace and stability in the country by indicating that "the reality is that the perpetrators did not seem to engage in further violence once serious plans got underway to create a penal tribunal. Thus, the SCSL functioned, at least in part, to dissuade further violence and in that way helped to restore peace. This has been confirmed by a recent survey of national perceptions about the contribution of the Court to peace in Sierra Leone." (Jalloh 2011: 452) He argues that the court stopped the remaining will to fight among the rebels by effectively destroying the command structure of the RUF and the AFRC. In addition to Jalloh's findings, Arzt (2006) finds evidence in his article on the perceptions of the local population about the legitimacy of the Special Court for Sierra Leone, that the people welcomed the court in general and there were just few debates about details that could have been improved or changed. However, in terms of the impartiality-perception the Special Court was seen as an American-backed project to undermine the influence of the ICC and to gather information on al-Qaeda's activities in Western Africa, which has called the court's credibility into question (Arzt 2006: 234).

According to the Freedom House ranking there have been some improvement in regard to Civil and Political Rights in Sierra Leone, including the rule of law within the country. In 2003, one year after the end of the civil war the score of civil liberties increased from 5 to 4 due to better security standards in the country. Furthermore, the respect for human rights improved visibly during the year, even though



press freedom suffered from a slight setback (Freedom House – Sierra Leone 2003). After beginning to try suspects of human rights violations before the Special Court in 2003, the scores for civil liberties reached a 3, and the overall freedom-ranking improved from a 4 to a 3.5, which according to Freedom House was “due to [...] increased pressures to punish those guilty of war crimes” (Freedom House – Sierra Leone 2004). In addition, the UN High Commissioner for Human Rights reported that the situation for human rights throughout 2003 and 2004 improved markedly (ECOSOC 2004) by seeing the cause of the positive development inter alia in the Special Court and the TRC in Sierra Leone: “The transition to peace has been aided by the work of the Truth and Reconciliation Commission (TRC) and the Special Court.” (ECOSOC 2004: 2). The upward trend continued through 2005 and 2006 as the trials of suspected war criminals got underway (Freedom House – Sierra Leone 2006). Former Liberian president Charles Taylor was arrested in Nigeria and transferred to the Special Court in Sierra Leone (Freedom House – Sierra Leone 2007). Even though oftentimes being accused of leading to recurrence of violence and unrest, the capture of Charles Taylor was not followed by instability or resurfacing of fighting by his supporters. However, as mentioned before, it was a conscious decision to try Taylor outside of the West African region due to concerns that his presence might spark violence (Freedom House – Sierra Leone 2007).

In regard to the standard of the rule of law, it can also be noted that the national judicial sector “has demonstrated independence, and a number of trials have been free and fair. However, corruption and a lack of resources are impediments to the effectiveness of the judiciary.” (Freedom House – Sierra Leone 2007). The Freedom House ranking awarded Sierra Leone in 2008 and 2009 a 3 as an overall score, which was received due to the successful holding of elections. Also, when comparing the report of the UN High Commissioner for Human Rights 2004 with the one issued in 2009, it is emphasized that not only the human rights situation has enormously improved, as there has been significant progress in the operationalization of a national human rights monitoring institution, but so has the Justice Sector and the rule of law (UNGA 2009: 11). For example, there was a new Anti-Corruption Law passed expanding rights and responsibilities of the Anti-Corruption Commission (UNGA 2009: 12). Also, several programs have been implemented to improve the effectiveness of the justice sector in Sierra Leone. The Special Court for Sierra Leone has completed all but two remaining cases in 2009, one of them the Charles Taylor case in The Hague, which has been concluded in 2012.

Despite the limitations of just being able to look at a rather short period of time, as it might take decades to realize the full impact of the court, and despite the fact that it is hard in this case to isolate effects of the Special Tribunal from the ones of the TRC in Sierra Leone, there have been overall positive developments in both, the status quo of human rights and the rule of law in the country. By conducting interviews with locals, Human Rights Watch concluded that many people were aware of the trials that

took place and understood their significance on the country's development (Gell 2012: 7). It is emphasized throughout various reports by NGOs that the Court has increased the understanding of accountability for human rights violations: "Sierra Leoneans and Liberians consistently told Human Rights Watch that Taylor's arrest and trial helped reveal the possibility for and value of justice in West Africa." (Gell 2012: 7)

3.4.3 No Transitional Justice in Burundi

As mentioned before, some post-conflict states decide to not investigate past crimes, either due to granted amnesties negotiated in peace agreements, such as in Mozambique, or because of a lack of political will or sometimes out of fear that trials might lead to instability and recurrence of fighting. In Burundi, crimes against humanity and genocide occurred during recurring incidents of violence due to ethnic tensions, following a brutally oppressing colonial period in the country. The decades of cyclic violence in Burundi were never truly addressed, leading to a culture of impunity in the state (Taylor 2013: 452). This is why Burundi will constitute a research case for the category of no transitional justice mechanism.

The ethnic conflict ended in an estimated death toll of 300.000 killed, both by Hutu and Tutsi. Many of these killings have been classified as crimes against humanity, and some have even been described as genocide as a UN Security Council Report confirmed after the end of the conflict (Human Rights Watch 2000). The ethnically-based cycles of violence in Burundi have commenced in 1965, shortly after the country reached its independence through the unsuccessful attempt by Hutu-militias to overthrow the Tutsi-dominated government. This pattern repeated itself many times, and led an extremely violent response by Hutus in 1972, after experiencing more-or-less systematic exclusion from important government positions, which in return triggered a reaction by the Tutsi-controlled national army to kill many Hutu-intellectuals (Rubli 2013: 6). Another outburst of violence occurred in 1988, when an estimated number of 20.000 Hutus were killed by the national army (Rubli 2013: 6-7). After attempts of a development towards democracy have been made, a civil war broke out in 1993, which was triggered by the assassination of the first democratically elected Hutu president Melchior Ndadaye (Rubli 2013: 6). During the civil war terrible massacres of Hutus killing thousands of Tutsis were carried out, often involving the slaughter of local politicians and administrative leaders (Human Rights Watch 2000). On the other hand, Tutsi soldiers, including the national police, killed thousands of Hutus as well, sometimes aided by Tutsi civilians, even in areas where no massacres against Tutsi had been taken place (Human Rights Watch 2000). Already in 1994, a year after the killings on a massive scale had taken place, the UN Security Council insisted on the installation of transitional justice mechanisms to hold the responsible ones accountable for the extreme human rights violations. It was primarily suggested to deal

with past crimes through an international tribunal, such as the one established for the genocide in neighboring Rwanda. However, these plans never translated into any attempts for implementation.

Over half a decade later, the major political parties signed the Arusha Peace and Reconciliation Agreement in 2000, including provisions on transitional justice in form of a Truth and Reconciliation Commission, an international commission with the purpose of shedding light on the horrific crimes that have been committed and establishing a historic record of the actual events. It was hoped that this transitional justice mechanism would finally lead to the reconciliation of the population. In 2004, the Burundian parliament passed a law on the establishment of the TRC, but it was never implemented. Part of the negotiated Arusha Peace Agreement was also the establishment of an international commission of judicial inquiry and an international criminal tribunal. None of these transitional justice mechanisms have been implemented so far, but there is some progress made by a cooperation of the UN mission in Burundi and the International Center for Transitional Justice.

Local Burundian courts have been dealing with some of the crimes, but numerous human rights NGOs criticized the proceedings and reported examples such as “Corneille Karikurubu was sentenced to death in trials that lasted around 30 minutes. He had no lawyer. No defence witnesses were heard. He was convicted of participating in the massacre of Tutsi civilians in 1993. He was detained for three months in a PSP cell in Karuzi where he was reportedly severely tortured.” (Amnesty International 1998: 31). These examples constitute the norm, rather than the exception, as despite large UN presence, international justice standards have not been applied so far. It has also been criticized that due to the extremely high number of persons involved in the ethnic-based massacres, trials, domestic or international might not be an applicable measure in this case. Besides being highly dysfunctional and unfair, the domestic courts are also overburdened with the amount of cases: “[...] Courts tried only about 20 percent of the 9500 persons jailed for supposedly having participated in the 1993 crimes.” (Human Rights Watch 2000).

The strategy of using no transitional justice mechanism has so far not produced positive developments in terms of human rights standards in the country and the rule of law. Since the end of the massacres in 1993, there have been numerous violent setback until the end of the decade. In a report issued by the UN Secretary-General on the situation in Burundi in 1996 it says that “the human rights situation in Burundi has assumed catastrophic proportions, with its endless stream of targeted assassinations, arbitrary arrests, forced disappearances, looting, crime and the destruction of property.” (UNGA 1996: 5). Freedom House ranked Burundi, in its very first report issued for the country in 1998, as not free, with the worst score possible in political rights, and a 6.5 in the overall freedom ranking (Freedom House – Burundi 1998). A slight improvement was perceived by Freedom House in 2001 due to the peace accords and the progress that has been made towards a power-sharing agreement. However, as the civil



war ended in 1993, the year 2001 is not included in the time frame that is looked in this research. It just should be noted that there is at least a slight improvement after increased efforts by the UN, and especially the U.S. government under President Clinton, who took part in the peace negotiations in Burundi (Freedom House – Burundi 2001).

A functioning rule of law was not existent in Burundi until the end of the 1990 as stated in a report by the High Commissioner of Human Rights in 2000: "The Commission on Human Rights [...] 18. *Notes* the efforts in the struggle against impunity and for the promotion of human rights on the part of the Government of Burundi, but expresses its deep concern at the violations of human rights and of international humanitarian law, in particular reports of massacres, enforced or involuntary disappearances, and arbitrary arrests and detention." (Office of the High Commissioner for Human Rights 2000). Instability and human rights violations seem to continue uninterrupted, as can be also seen a Human Rights Watch Briefing Paper issued in 2003, looking back at the past years: "Combat and violence intensified in recent weeks throughout the country and the new laws on justice are encumbered with provisions that will slow their implementation. In addition, international donors have not yet fully funded an African Union peacekeeping force essential for monitoring the cease-fire." (Human Rights Watch 2003: 1). Also, whenever atrocities occurred, perpetrators were hold accountable only in a vanishingly small minority of cases, as several examples show: "In several of the most serious massacres documented by Human Rights Watch, government soldiers have escaped all meaningful punishment. The most flagrant recent example of virtual impunity for massive civilian killings was the decision of a military court to sentence two officers to four months of prison in the Itaba massacre [...] the officers were finally convicted of having failed to follow orders by not having reported the situation accurately. They were not sanctioned for the killings themselves." (Human Rights Watch 2000)

As the situation in Burundi remains serious, there has been lots of discussion on which type of justice should be implemented, as there are still plans to end impunity in the country. What would work best for reconciling a country that has suffered for decades under ethnic tensions? How can countries deal with the experience of genocide? Amnesty International commented on the possible establishment of an international tribunal in a report issued in 1998 and concludes that due political reality, such as insufficient financial support due to lack of international interest as well as the proposal of limiting the time frame of cases that would be included in the investigations, as that would affect impartiality: "Calling for the creation of an international tribunal should not be a way of abdicating responsibility. Primary responsibility for justice is with the national authorities and the national courts. Even in the unlikely eventuality of a fully resourced and impartially mandated international tribunal being created for Burundi, it would only ever be able to deal with a handful of cases. This would not be sufficient to address impunity and improve justice and human rights in Burundi." (Amnesty international 1998: 39)

Human Rights Watch sees an international tribunal in Burundi as a chance, but is also of the opinion that the majority of cases should be judged by local courts, with the help of qualified international personnel training local judges (Human Rights Watch 2000). In contrast, Taylor (2013: 466) sees the best approach for Burundi’s transitional justice in the establishment of a locally based TRC with a high level of inclusiveness of the local population. The findings of Samii (2013), who conducted an empirical study about the preferences of the Burundian population, suggest that “expressed opinion tends strongly to favor ‘forgiving and forgetting’ over the pursuit of punishment or truth-seeking” (Samii 2013: 9-10).

The debate about applicable and efficient justice mechanisms in Burundi basically summarizes the whole controversy over which TJ mechanism should be the way to go in the future. Despite Samii’s observations, current scholarly and policy-debate tends to assume that at least to a certain degree, international judicial assistance should be provided. What can be concluded from the situation in Burundi, in which no transitional justice mechanism was applied, is that it certainly did not help to stop atrocities from occurring, let alone establish a functioning rule of law or a decent status quo of human rights.

IV: Conclusion and Discussion

The qualitative research conducted in this thesis was aiming at finding out how transitional justice can be most effective – either installed and organized under the theoretical assumptions of liberal peacebuilding, set-up as a mixed tribunal to further integrate local approaches of justice and reconciliation, or following the notion of “forgive and forget” and leave past crimes in the past, and rather focus on the future of the war-shattered society.

As transitional justice is defined as trying to bring justice to victims by punishing severe human rights abuses and therefore raise awareness for human rights and the rule of law within the country where crimes were taking place, this thesis focused on effects of tribunals on human rights standards and improvements of the justice sector in the post-civil war state. There were three different hypotheses brought forward. H1 was based on the theory of liberal peacebuilding assuming that liberal democratic states are less likely to go to war with each other, which is why countries should all be modeled after the example of Western, liberal market democracies. Therefore, states evolving from conflict should follow the retributive justice approach of trying individuals responsible for past human rights violations based on international justice standards and laws. H2 was built on a critique that the approach of liberal peacebuilding is flawed as it fails to take into account local perceptions and norms of justice which is why there should be alternative methods of pursuing justice tried. This alternative method can be translated into a hybrid or mixed court, which includes not only international assistance and norms, but also domestic customs and laws, which might lead to more transparency and proximity. H3 predicts that

having no tribunals or other justice mechanisms at all might be the best way to approach unstable post-conflict states to prevent further atrocities from happening, and might give a chance to local institutions to achieve the rule of law and higher human rights standards by themselves.

The cases, which were collected to test the above mentioned hypotheses, were the International Criminal Court in the DRC, the Special Court for Sierra Leone, and the situation in Burundi without any transitional justice measures taken. After controlling for possible alternative factors influencing the dependent variable, the cases were analyzed in regard to the effects achieved in every case. Both the DRC and Burundi did not show any significant improvements in human rights standards or the rule of law, and both countries experienced recurrence of violent outbreaks within the five-year timeframe. When comparing Burundi and the DRC within this frame, then it can be said that Burundi was doing worse in the years following the end of its civil war, which leads to the conclusion that international transitional justice is better than nothing. However, when compared to Sierra Leone, it can be clearly seen that the hybrid court to try former perpetrators was the most successful one. Keeping in mind that Sierra Leone had shortly after its civil wars one of the worst human rights situation in the world, the improvements that the country has made are tremendous. The comparison conducted in this thesis leads to the conclusion that H2 can be confirmed, with the hybrid court in Sierra Leone being a prime example for possible future transitional justice set-ups.

However, what can also be concluded from the findings in this research is that in order to be successful transitional justice has to be financially supported and accompanied by further peacebuilding measures, such as training for local judges and a good outreach unit to stay connected with the domestic population. The conditions under which TJ mechanisms are implemented are decisive. One important factor for successfully implementing tribunals, international or mixed, is the political backing in the country. But also the local population has to understand why these mechanisms have been applied and be supportive. Coming back to the quote of Samantha Power at the beginning of this thesis, people not only in Darfur, but everywhere in the world should know why and how trials are implemented. They should get a feel for how justice helps their individual situation. This is why further research about the effects of trials is needed to analyze how transitional justice can be implemented more successfully in the peacebuilding process.

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